IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1098 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

STATE OF GUJARAT

Versus

DAMJI GOPAL AYAR DHORI TAL.BHUJ-KUTCH

Appearance:

1. Criminal Appeal No. 1098 of 1991

MR KC SHAH, APP for Petitioner No. 1

MR MAHENDRA K PATEL for Respondent No. 1

CORAM : MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 19/10/2001

JUDGEMENT

1. The State of Gujarat through Shri Manharlal C. Patel, Food Inspector, Bhuj Nagar Palika, has preferred this appeal under Section 378 of the Code of Criminal Procedure (hereinafter referred to as 'the Cr.P.C.')

challenging the judgment and order of acquittal passed by the learned Chief Judicial Magistrate, Kutch at Bhuj in Summary Case No. 375 of 1989 dated 26/11/1990.

2. The respondent original accused Damji Gopal Ayar was prosecuted for alleged commission of offences made punishable under section 7 read with section 16 of the Prevention of Food Adulteration Act (hereinafter referred to as 'the Act'). According to the prosecution, Food Inspector Manharlal Chunilal Patel, who at the relevant time was attached to Bhuj Nagar Palika was on his usual round on 22/9/1988. At about 12.30 p.m. he visited the shop of the respondent, which is situated near Janta Ghar, Bhuj. At the shop he found that respondent had stored milk of cow in tin utensil for sale. The Food Inspector for the purpose of analysis purchased 660 ml. of cow milk from the respondent. Before collecting the sample the Food Inspector shook the milk with aluminium vessel for measure and thereafter he collected 660 ml. of milk in a clean and empty steel jug, which was carried by him. He paid the money for purchase of milk to the respondent and obtained the cash memo. The Food Inspector also gave a written notice as required under Rule 12 of the Prevention of Food Adulteration Rules (hereinafter referred to as 'the P.F.A. Rules'). The Food Inspector then divided 660 ml. of cow milk in three equal parts and filled each part in three empty, clean and moistureless bottles. He also added 18 drops of formalin as preservative. He thereafter closed the mouth of the bottle with a cork and tighten it so as to prevent any moisture entering the bottle. The Food Inspector thereafter applied the seal covering the cork as well as some portion of the glass of the bottle. He thereafter pasted a paper label bearing name of the municipality on different sides of the bottle with gum and in the label he wrote the serial no., date, place, nature of the sample, name of the vendor, the type of preservative, etc. This procedure was carried out by him in the presence of the panchas. Before filling the bottles with sample milk, they were duly shown to the panchas to enable him to ascertain that the bottles were clean, empty and moistureless. The Food Inspector also obtained signatures of the vendor - respondent and panchas on the label. He also put his signature on the said label. The Food Inspector thereafter in the presence of panch wrapped each bottle in different paper wrapper and pasted their ends with gum after folding them inwardly. He thereafter pasted a slip containing the signature, serial no. and code no. of the Local Health Authority,

Bhuj-Kutch on wrapped bottle. The said slip was pasted around the bottle in such a manner that it covered the cork as well as bottom of the bottle from one side and again going round the bottle and coming on the top of the bottle from the other side of it. The said slip and wrapper were duly signed by the Food Inspector, panchas as well as the respondent - vendor. The Food Inspector then tied the wrapper containing bottle crosswise with twine bringing the knot on the top portion i.e. mouth of the bottle. He thereafter applied four seals of the Municipality on each bottle, one on the mouth of the bottle, and one at the bottom and one each on two sides of the bottle. The Food Inspector thereafter despatched one bottle in accordance with rule 17 of the P.F.A. Rules to the Public Analyst, Rajkot alongwith the memorandum containing seal impression in a sealed packet on 23/9/1988. He also despatched by Regd. A.D. Post separately copy of the memorandum containing seal impression in a sealed cover. The Food Inspector duly informed the Local Health Authority about the despatch of the sample to the Public Analyst and he forwarded two bottles of milk sample alongwith two copies of the memorandum bearing seal impression in a sealed packet to the Local Health Authority on 23/9/1988. The Public Analyst, Rajkot carried out the analysis and he forwarded the analysis report bearing No. Q.3/523/88 alongwith forwarding letter dated 5/10/1988 under his signature to the Food Inspector, which was received by him on 11/10/1988. In the opinion of the Public Analyst, the sample of milk did not conform to the standards prescribed for cow milk under the provisions of the Act as well as the Rules and hence the same was found to be adulterated. On receipt of the report, the Food Inspector submitted the report and other relevant papers to the Local Health Authority, Bhuj-Kutch for obtaining its requisite consent to prosecute the respondent, on 12/12/1988. The Food Inspector received the consent of the Local Health Authority, Bhuj-Kutch on 6/1/1989 to lodge necessary complaint against the respondent for committing offence u/S. 7 read with Sec. 16 of the Act. The Food Inspector, on 23/1/1989 lodged complaint against the respondent for aforesaid offences in the Court of the Ld. Chief Judicial Magistrate, Kutch at Bhuj. After lodging the complaint, the Food Inspector served a notice by Regd. A.D. Post on the respondent under the provisions of Section 13 (2) of the Act, which was duly received by the respondent. The office copies of the notice and the postal acknowledgement receipt thereof have been produced by the Food Inspector on record at Exhs. 22 and 23 respectively. No application was submitted by the respondent for getting the sample

analysed by the Director of Central Food Laboratory.

At the trial, it being in summary way, gist of the accusation levelled against the respondent was read out to him and he pleaded not guilty and claimed to be tried. His further statement u/S. 313 of the Cr.P.C. shows that he has denied each and every circumstances put to him as being false.

3. At the end of the trial the Ld. Magistrate came to the conclusion that the prosecution had failed to prove that the sample of cow milk collected by the Food Inspector on 22/9/1988 from the respondent was adulterated one and that the respondent had not committed any offence u/S. 7 read with section 16 of the Act. While appreciating the evidence on record, the Ld. Magistrate was of the opinion that there was considerable time gap between the date of collection of the sample and date of the complaint before the Ld. Magistrate and also date of collection of sample and date of service of notice u/S. 13(2) of the Act on respondent and in view of that, it was quite possible that the remaining two samples kept with the Local Health Authority might have got deteriorated and no useful purpose would have been served by sending them to the Director of Central Food Laboratory. In the opinion of the Ld. Magistrate the delay on the part of Food Inspector had deprived the respondent of exercising a valuable right under section 13 (2) of the Act for getting the other sample analysed by the Director of Central Food Laboratory. In support of his conclusion the Ld. Magistrate has relied on the decision rendered by the High Court of Orissa in the case of Shatrughna Basera v/s. Municipality reported in 1968 Criminal Law Journal at page 123. In the said case notice u/S. 13(2) of the Act was served on the accused five and half months after the sample was collected. No request was made by the accused to get the sample analysed by the Director of Central Food Laboratory under the provisions of Section 13(2) of the Act. Inspite of that, the Orissa High Court took the view that the sample of milk was bound to get deteriorated and there was no meaning in accused making an application u/S. 13(2) of the Act for getting the sample reanalysed by the Director of Central Food Laboratory. The Orissa High Court, therefore, held that since the accused was deprived of valuable right conferred on him by section 13(2) of the Act, he should be given benefit of doubt and thus the accused was acquitted in that case. According to the Ld. Magistrate, the Public Analyst report at Exh.17 already showed that the requisite contents of milk solid non fat should be minimum 8.5%, whereas the present sample

contained milk solid non fat to the extent of 7.5% and the respondent therefore cannot be held guilty for the same as proper arrangement for preserving the samples was not made. Moreover, according to Ld. Magistrate there was no evidence to show that the Food Inspector had churned the milk to make it homogeneous and to have representative sample. He also held that there was no satisfactory evidence to show that utensil for collecting samples were clean and moistureless. The Ld. Magistrate therefore, vide judgment dated 26/11/1990 gave benefit of doubt to the respondent and acquitted him of the offences with which he was charged. Hence, the present appeal.

4. Mr. K.C. Shah, Ld. APP has taken me through the record of the case and he has submitted that the judgment and order of acquittal passed by the Ld. Magistrate were erroneous in view of the fact that no application by the respondent was made under the provisions of section 13(2) of the Act for getting the sample reanalysed by the Director of Central Food Laboratory and when the respondent had not exercised the said right conferred upon him u/S. 13(2) of the Act, by no stretch of imagination it could be said that the respondent was deprived of his valuable right. He has further submitted that conclusions reached by Ld. Magistrate regarding sample not being a representative one and the uncleaned utensils are contrary to practically unassailed evidence of Food Inspector on these aspects. As against that, Mr. Mahendra K. Patel, learned advocate appearing for the respondent, submitted that the view taken by the Ld. Magistrate was legal and proper and there was no need to interfere with the same by this Court.

5. That the prosecution has relied on oral as well as documentary evidence in support of its case. For that purpose it has examined Manharlal Chunilal Patel, the Food Inspector P.W.1 at Exh.8 and Bhupat Harilal Thakkar, the panch P.W.2 at Exh.25. Prosecution has also produced certain documentary evidence such as cash memo for purchase of milk at Exh.10, office copy of notice under rule 12 of the Rules at Exh.11, panchnama at Exh.12, intimation given to the Local Health Authority at Exh.13, the postal acknowledgement for despatch of seal impression alongwith sample and memorandum to the Public Analyst at Exh.15, a copy of the memorandum containing seal impression at Exh. 16 and report of the Public Analyst at Exh.17.

6. The Food Inspector in his deposition has stated that on 22/9/1988 he was on his duty in his capacity as

Food Inspector attached to Bhuj Nagar Palika. He visited the shop of the respondent who was dealing in business of selling milk and purchased 660 ml. of cow milk for the purpose of analysis. Before collecting the sample from the utensil placed in the shop, he churned the milk with a view to obtain a representative sample. He thereafter collected in a clean and empty utensil 660 ml. of cow milk and divided the same into three equal parts. According to the witness, he thereafter took out three clean, empty and moistureless glass bottles and filled each bottle with each part of the milk and he applied the cork on the bottles and thereafter wrapped them in a paper and tide them and sealed them. In his deposition he has described in detail the entire process of sealing, packing, etc. in the manner stated in this judgment as above. He also applied the slips and labels containing his signature and the signatures of panch as well as of respondent on each bottle. The entire procedure was simultaneously recorded in the form of a panchnama in the presence of panch. The said panchnama was also signed by the witness as well as the panch and the respondent. One sample was sent by him to the Public Analyst, Rajkot on 23/9/1988 alongwith memorandum as envisaged by rule 17 of the Rules and also despatched a copy of the memorandum to the Public Analyst alongwith copy of seal impression separately by Regd. A.D. Post. Two bottles alongwith seal impression and memorandum were forwarded to the Local Health Authority for keeping the same in its custody. He received the report of the Public Analyst, Rajkot alongwith the forwarding letter dated 11/10/1988, showing that the sample was adulterated. On receipt of the report, he submitted report of the Public Analyst as well as other relevant case papers to the Local Health Authority for obtaining its consent under the provisions of section 20(2) of the Act on 12/12/1988 and the consent was received by him from the Local Health Authority on 6/1/1989. The complaint was lodged on 22/1/1989. This witness has further stated that according to the report of the Public Analyst the sample of cow milk did not conform to the standards prescribed under the Act and the Rules and hence the same was adulterated. In the cross-examination, this witness has stated that there is no facility of refrigerator to store the samples of food articles. He has further stated that the samples despatched to the Local Health Authority, Bhuj was not preserved in ice. He has further stated in the cross-examination that he was not aware of the fact that the milk would contain fat substance according to the quality of food the cattle has eaten. He has further stated that he himself had cleaned the utensil in which the sample was collected and he denied the suggestion

that it was not cleaned by him, but by his peon.

7. The second witness Bhupat Harilal Thakkar P.W. 2 Exh.25 had acted as panch to witness the entire proceedings of collecting and sealing the samples. This witness has not supported the prosecution and, therefore, he has been declared hostile. The Ld. Public Prosecutor after obtaining permission of the Court has cross-examined him and confronted him with his previous statement and has ultimately suggested that he was not speaking the truth with a view to oblige the respondent.

8. Considering the evidence on record, it clearly emerges that the sample of cow milk collected by the Food Inspector from the shop of the respondent did not conform to the standards prescribed under the Act and the Rules in as much as the minimum requirement of contents of milk solid non fat prescribed under the Act and the Rules is 8.5%, whereas the present sample of cow milk contained it only to the extent of 7.5%. The defence has not been successful to challenge this fact. It also transpires from the evidence of the Food Inspector that he had strictly complied with all the requisite formalities prescribed under the Act as well as the Rules for collecting the samples, packing and sealing them and despatching one sample to the Public Analyst and two remaining samples to the Local Health Authority; obtaining consent u/S. 20 of the Act from the Local Health Authority to prosecute the respondent, lodging the complaint before the Ld. Magistrate and serving due notice thereof u/S. 13(2) of the Act to the respondent. Thus, in the cross-examination of this witness the defence has not been able to elicit any material so as to render the case of the prosecution vulnerable . It has been now well settled that even the evidence of Food Inspector is sufficient to base conviction of the accused for the offences under the Act. It is therefore, hardly material that the panch has turned hostile and has not supported the prosecution. Considering the entire evidence of Food Inspector alongwith the documentary evidence, it becomes crystal clear that the prosecution has been able to establish that the Food Inspector had followed mandatory procedure all throughout and the sample of cow milk in question was adulterated one. The question that requires consideration is whether in the light of the fact that even when the respondent has not made an application under the provisions of section 13(2) of the Act, it can be held, as has been done by the Ld. Magistrate that he has been deprived of a valuable right conferred on him u/S. 13(2) of the Act, when there is considerable delay between the date of collection of the

sample and the date of notice to the accused under the provisions of section 13(2) of the Act. In the instant case the sample was collected by the Food Inspector on 22/9/1988 at 12.30 p.m. from the respondent. The same was despatched to the Public Analyst on 23/9/1988 and the report of the Public Analyst was received by the Food Inspector on 11/10/1988. The Food Inspector submitted report alongwith the relevant papers of the case to the Local Health Authority, Bhuj-Kutch for obtaining its consent under section 20 of the Act on 12/12/1988. The consent was received on 6/1/1989 and the complaint was lodged by the Food Inspector on 23/1/1989. Notice u/S. 13(2) was received by the respondent on 28/1/1989. Thus, according to the defence there was inordinate delay between the date of collection of the samples and the date of receipt of the notice u/S. 13(2) of the Act by the respondent and because of the said delay the remaining two samples lying with Local Health Authority were bound to get deteriorated and there was no meaning in even applying for sending the said samples for reanalysis to the Director of Central Food Laboratory. Thus according to the defence on account of the aforesaid inordinate delay, the respondent had been deprived of his valuable right u/S. 13(2) of the Act. As stated above, the Ld. Magistrate has accepted this contention of the respondent and for that he has also relied on the judgment rendered by the Orissa High Court and has come to the conclusion that the prosecution was solely responsible for the delay and its benefits should go to the respondent. He has, therefore, acquitted the respondent giving him benefit of doubt.

9. The evidence of Food Inspector clearly reveals that while preparing the samples of milk and before packing them, he had added drops of preservative in accordance with the rules prescribed for the same and thereafter he had tightly applied the cork on each of the bottles and thereafter he had wrapped and sealed the bottles containing sample of milk in the manner prescribed by rules meant for sealing, fastening and despatch of samples. Therefore, there was no possibility of the remaining two samples of cow milk being rendered unfit for analysis. The very purpose of adding formalin in particular proportion is to preserve the sample of cow milk in the same condition for a considerable period. Moreover, the defence has not put any question to Food Inspector in the cross-examination suggesting that despite addition of formalin and sealing and packing the sample in the manner described above, there was bound to be deterioration, rendering the sample unfit for analysis. In absence of any material it is not desirable

to draw such inference. In my opinion it was error on the part of the Ld. Magistrate to hold that no useful purpose would have been served by sending a sample to the Director of Central Food Laboratory for analysis by him at the instance of respondent and the respondent therefore, was deprived of his right u/S. 13(2) of the Act. The Hon'ble Supreme Court in the case of Ajitprasad v/s. State of Maharashtra reported in AIR 1972 S.C. at page 1631, after quoting section 13(2) of the Act as it stood then, has observed as follows :-

> "It is clear from the subsection that the appellant should have made an application after paying the prescribed fee if he wanted the part of the sample available with him to be sent to the Director for analysis. If he had made the application after paying the prescribed fee, the Magistrate would have had no option but to send the part of the sample for analysis by the Director. If in pursuance of the application the part of the sample was sent to the Director and he had reported that the part of the sample was incapable of analysis for the reason that it was decomposed, the appellant could perhaps, have contended that he was deprived of his right to have the sample analysed by the Director on account of the laches of the complainant and that he should be acquitted. But, since the appellant never applied under section 13 (2) of the Act, he cannot complain that he has been deprived of any right. In Babulal Hargovindas v. The State of Gujarat, 1971-1 SCC 767 - (AIR 1971 SC 1277) Jaganmohan Reddy, J., speaking for the Court, said that unless an application to send the sample to the Director is made, the vendor cannot complain that he was deprived of his right to have the sample analysed by the Director."

10. This right has been kept intact in amended Section 13(2) of the Act also. Hence, in the light of the aforesaid decision of the Hon'ble Supreme Court, it is very clear that the Ld. magistrate was completely in error in relying on the aforesaid decision of the Orissa High Court and to hold that even when the respondent had not made any application for getting the one of the two remaining samples reanalysed by the Director of Central Food Laboratory, he had been deprived of the valuable right conferred upon him by provisions of section 13 (2) of the Act, in view of the fact that there was

considerable time gap between the date of collection of the sample and the date of receipt of the notice by the respondent under the provisions of section 13 (2) of the Act. When no such application has been made by the respondent, he cannot be acquitted on the ground that he was deprived of his valuable right of getting the sample reanalysed by the Director of Central Food Laboratory.

Moreover, evidence of Food Inspector which has been narrated in detail in foregoing para. 5 clearly show that he had strictly followed all the mandatory requirements while collecting sample. He himself had churned the milk before drawing sample from the main tin utensil in the shop in which cow milk was stored for sale and he himself had cleaned the utensils and bottles on previous day. This part of his evidence is practically not challenged in cross-examination of the Food Inspector. Secondly, merely because he had not maintained the daily worksheet, it cannot be said that he had not cleaned the vessels for collecting sample. The findings given by the Ld. Magistrate are, therefore, apparently erroneous. The order of acquittal passed by the Ld. Magistrate is also therefore, glaringly erroneous and deserves to be quashed and set aside.

11. Mr. M.K. Patel, learned counsel appearing for the respondent has not been able to cite any decision in his favour. No other submission has been made by him to persuade me to uphold the order of acquittal passed by the Ld. Magistrate.

In view thereof, I have no other alternative but to set aside the judgment and order of acquittal passed by the Ld. Chief Judicial Magistrate, Kutch at Bhuj dated November 11, 1990 and convict the respondent for offence under section 7 (1) read with and section 16 (1) (a) (i) of the Act. On the question of sentence he has only submitted that in the instant case the prosecution has been lodged against respondent only because in the opinion of the Public Analyst the contents of milk solid non fat was marginally less i.e. by 1%. In other words, the limit prescribed under the Act is 8.5% minimum, whereas the report of the Public Analyst indicated that it was 7.5%. He, therefore, averred that this was merely a technical violation of the provisions of the Act and the Rules and the respondent has not mixed any foreign substance in the cow milk so as to render it dangerous for human consumption. He has further submitted that the sample was collected by the Food Inspector way back on 22/9/1989 and after lapse of about 13 years if the respondent who is a petty trader is ordered to suffer

imprisonment, it would ruin him and his family.

It is true that the offence is merely a technical one and if the respondent is required to go to jail, it will cause not only immense hardship to him, but to his family members also. However, provisions of section 16 of the Act after the amendment introduced in the year 1976 make the sentence of imprisonment compulsory and the minimum punishment prescribed is six months. I have, therefore, no choice but to impose on respondent the sentence of six months' simple imprisonment and to pay a fine of Rs.1,000/-, in default further simple imprisonment for 7 days. Hence, I hereby set aside the impugned judgment and order of acquittal and sentence the respondent to undergo simple imprisonment for six months and to pay a fine of Rs.1,000/-, in default further simple imprisonment for 7 days.

However, considering the special features of the case, namely that this is merely a technical offence and 13 long years have already passed and all these times the respondent has suffered mental agony and torture, leave apart the finance spent by him for litigation, it will be in the fitness of things to give the benefit of provisions of clause (d) of section 433 of the Cr.P.C. to the respondent. The provisions of Section 433 Clause (d) read as under :-

"The appropriate Government may, without the consent of the person, sentence, commute
(a) xxx xxx xxx
(b) xxx xxx xxx
(c) xxx xxx xxx
(d) a sentence of simple imprisonment or fine."

At this juncture it will not be out of place to refer to and rely on two judgments of the Apex Court.

Before the Apex Court similar situation had arisen and the Apex Court in the case of N. Sukumaran Nair v/s. Food Inspector, Mavelikara reported in 1995 Criminal Law Journal at page 3651 had extended the benefit of clause (d) of Section 433 of Cr. P.C. to the appellant of the said case in following manner :-

"The offence took place in the year 1984. The appellant has been awarded six months' simple imprisonment and has also been ordered to pay a

fine of Rs.1,000/-. Under clause (d) of Section 433 of the Code of Criminal Procedure, 'the appropriate government' is empowered to commute the sentence of simple imprisonment for fine. We think that this would be an appropriate case for commutation of sentence where almost a decade has gone by. We, therefore, direct the appellant to deposit in the trial Court a sum of Rs.6,000/(sic) as fine in commutation of the sentence of six months' simple imprisonment within a period of six weeks from today and intimate to the appropriate government that such fine has been deposited. On deposit of such fine, the State Government may formalise the matter by passing appropriate orders under clause (d) of Section 433 of the Code of Criminal Procedure."

In the case of Santosh Kumar v/s. Municipal Corporation reported in 2000 Criminal Law Journal at page 2777 the Apex Court had again extended the benefit of clause (d) of Section 433 of Code of Criminal Procedure to the appellant of the said case and relying upon the decision rendered in N. Sukumaran Nair (supra) it has stated as under :-

"5. This case seems to be almost on a parallel with the facts enumerated in the decision cited above. We are also persuaded to extend the same benefit which the appellant in the aforesaid decision was granted by this Court, as this would be an appropriate case for commutation of sentence under Claude (d) of Section 433 of the Code of Criminal Procedure.

6. We, therefore, direct the appellant to deposit in the trial Court a sum of Rs. 10,000/- as fine in commutation of the sentence of 6 months imprisonment within a period of 6 weeks from today and intimate to the appropriate Government that such fine has been deposited. On deposit of the fine the State Government may formalise the matter by passing appropriate order under Clause (d) of Section 433 of the Code of Criminal Procedure. In the meanwhile the appellant will remain on bail."

In both the cases the facts were quite similar to the facts of present case in as much as in that case sample was found adulterated solely on the ground that its

constituents fell below the standard very marginally. In the case before me, the sample is found to be adulterated solely on the same ground. I, therefore, direct the respondent to deposit a sum of Rs.3,000/- (Rupees three thousand) in the trial Court as fine in commutation of the sentence of six months' simple imprisonment within a period of two months from the date of this judgment and intimate to the appropriate Government alongwith certified copy of the judgment that such fine has been deposited. On deposit of such fine the State Government may formalise the matter by passing appropriate order under Clause (d) of Section 433 of the Cr. P.C. Respondent to remain on bail till then.

With aforesaid direction, the impugned judgment is set aside and the present appeal is allowed.

[AKSHAY H. MEHTA, J.]

* Pansala.